

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

JEFFREY BRETT GOODIN

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

Case No. CV09-5840-CAS  
(CR06-186-CAS)

ORDER DENYING PETITIONER'S  
MOTION FOR RELIEF PURSUANT TO  
28 U.S.C. § 2255

**I. INTRODUCTION**

This case arises out of petitioner Jeffrey Brett Goodin's conviction on June 11, 2007 after trial by jury. Specifically, petitioner was convicted on three counts of wire fraud pursuant to 18 U.S.C. § 1343; one count of knowing and material falsification of email headers pursuant to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act"), 15 U.S.C. §§ 7701-13 and 18 U.S.C. § 1037; one count of aiding and abetting the use of unauthorized access devices pursuant to 18 U.S.C. §§ 1029(a)(2); one count of possession of unauthorized access devices pursuant to 18 U.S.C. §§ 1029(a)(3); one count of aggravated identity theft pursuant to 18 U.S.C. § 1028A(a)(1); one count of use of a counterfeit mark pursuant to

1 18 U.S.C. § 2320(a); two counts of witness harassment pursuant to 18 U.S.C. §  
2 1512(d)(1); and one count of failure to appear pursuant to 18 U.S.C. §§ 3146(a),  
3 (b)(1)(A)(iii). Mot. at 2. By the instant motion, petitioner challenges his conviction for  
4 knowing and material falsification of email under the CAN-SPAM Act. The jury found  
5 that petitioner devised and executed an internet “phishing” scheme, wherein he obtained  
6 personal information from an Internet Service Provider (ISP”) and America Online  
7 (“AOL”) users by sending them unsolicited e-mails that falsely purported to be from the  
8 AOL billing department and prompting them to input their personal and financial  
9 information. Opp’n at 2; See Dkt No. 98 (Trial Minutes 1/12/07). To carry out this  
10 scheme, petitioner sent emails to AOL users with falsified header information by using  
11 fraudulently created e-mail accounts with ISP Earthlink. Id.

12 On June 11, 2007, petitioner was sentenced to seventy months in prison and was  
13 ordered to pay restitution in the amount of \$1,002,885.58, which included the sum of  
14 \$996,680 payable to Earthlink. Opp’n at 13-15. On June 13, 2007, petitioner timely  
15 filed a notice of his appeal of his conviction and sentence on the charge of violating the  
16 CAN-SPAM Act. On appeal, petitioner argued that his conviction on this count must  
17 be vacated because the evidence was insufficient to prove that the e-mail was  
18 “commercial,” which was an element of the offense, and that the jury instruction  
19 defining “commercial e-mail” erroneously included messages “related to” a commercial  
20 product or service. Id. at 15. He further argued that the \$996,680 loss reported by  
21 Earthlink should not have been used in calculating petitioner’s sentencing guideline  
22 range because Earthlink’s calculation bore no relation to petitioner’s conduct. Id.  
23 Petitioner also argued that because there was no evidentiary support for the loss claimed  
24 by Earthlink, the restitution order should be vacated. Id. On December 17, 2008, the  
25 Court of Appeals for the Ninth Circuit affirmed defendant’s convictions, his sentence,  
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1 and the restitution order.<sup>1</sup> Id. at 16. On January 30, 2009, petitioner filed a petition for  
 2 rehearing and for rehearing en banc.<sup>2</sup> Id. On February 26, 2009, the Ninth Circuit  
 3 denied petitioner's petition for rehearing and for rehearing en banc. Id.

4 On August 11, 2009, petitioner filed the instant motion under 28 U.S.C. § 2255 to  
 5 vacate, set aside, or correct sentence by a person in federal custody, in which he alleged  
 6 that he received ineffective assistance of counsel at trial and sentencing. The  
 7 government filed its answer on February 25, 2010. A reply was filed on March 22,  
 8 2010.

## 9 **II. LEGAL STANDARD**

10 A petition pursuant to 28 U.S.C. § 2255 challenges a federal conviction and/or  
 11 sentence to confinement where a prisoner claims "that the sentence was imposed in  
 12 violation of the Constitution or laws of the United States, or that the court was without  
 13 jurisdiction to impose such sentence, or that the sentence was in excess of the maximum  
 14 authorized by law, or is otherwise subject to collateral attack." Sanders v. United  
 15 States, 373 U.S. 1, 2 (1963).

16 Ineffective assistance of counsel constitutes a violation of the Sixth Amendment

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18 <sup>1</sup> The Ninth Circuit agreed with petitioner's argument that including the "related to"  
 19 language in the jury instructions "impermissibly expanded the scope of the statute, but that  
 20 the petitioner had not shown plain error." United States v. Goodin, No. 07-50276, 2008  
 21 U.S. App. LEXIS 27342, at \*2 (9th Cir. Dec. 17, 2008)). Additionally, the court stated that  
 22 the loss and restitution calculations submitted by Earthlink were "seriously flawed," but  
 23 that petitioner failed to challenge the causation issue at trial. Id. at 3. Thus, the court found  
 24 no plain error requiring reversal. Id.

25 <sup>2</sup> In the petition for rehearing, petitioner argued that plain error review was not  
 26 appropriate because petitioner "raised the causation argument in his sentencing position  
 27 paper." Opp'n at 16 (citing Appellant's Opening Brief at 171). Petitioner further argued  
 28 that he was unable to challenge Earthlink's methodology for its loss calculation because  
 it was not included in the pre-sentence report and was not apparent until the government  
 submitted its sentencing paper which was after petitioner filed his. Lastly, petitioner  
 contended that the government did not argue that the loss and restitution calculations  
 should be reviewed for plain error on appeal. Id. at 16-17.

1 right to counsel, and thus, if established, is grounds for relief under § 2255. To  
2 establish ineffective assistance of counsel, a petitioner must prove by a preponderance  
3 of the evidence that: (1) the assistance provided by counsel fell below an objective  
4 standard of reasonableness; and (2) there is a reasonable probability that, but for  
5 counsel's errors, the result of the proceeding would have been different. Strickland v.  
6 Washington, 466 U.S. 668, 688, 694 (1984). A claim of ineffective assistance of  
7 counsel fails if either prong of the test is not satisfied and petitioner has the burden of  
8 establishing both prongs. Id. at 697; United States v. Quintero-Barraza, 78 F.3d 1344,  
9 1348 (9th Cir. 1995).

10 With respect to the first prong, the court's review of the reasonableness of  
11 counsel's performance is "highly deferential," and there is a "strong presumption" that  
12 counsel exercised reasonable professional judgment. Id. The petitioner must  
13 "surmount the presumption that, under the circumstances, the challenged action might  
14 be considered sound trial strategy." Id.

15 After establishing an error by counsel and thus satisfying the first prong, a  
16 petitioner must satisfy the second prong by demonstrating that his counsel's error  
17 rendered the result unreliable or the trial fundamentally unfair. Lockhart v. Fretwell,  
18 506 U.S. 364, 372 (1993). A petitioner must show that there is a reasonable probability  
19 that, but for his counsel's error, the result of the proceeding would have been different.  
20 Strickland at 694. A "reasonable probability" is a probability sufficient to undermine  
21 confidence in the outcome. Id.

22 The Court need not necessarily determine whether petitioner has satisfied the first  
23 prong before considering the second. The Supreme Court has held that "[i]f it is easier  
24 to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that  
25 course should be followed." Id. at 670. Indeed, a petitioner's failure to allege the kind  
26 of prejudice necessary to satisfy the second prong is sufficient by itself to justify a  
27 denial of a petitioner's § 2255 motion without hearing. Hill v. Lockhart, 474 U.S. 52,  
28 60 (1985).

### III. DISCUSSION

Petitioner asserts that he was provided ineffective assistance of counsel at his original trial and at sentencing. Mot. at 5. Petitioner argues that his counsel provided ineffective assistance of counsel by (1) failing to object at trial to a jury instruction defining “commercial e-mail” as used in the CAN-SPAM Act; (2) failing to object at sentencing on causation grounds to the inclusion of the cost of Earthlink’s servers in the loss amount; and (3) failing to object at sentencing on causation grounds to the inclusion of the cost of Earthlink’s servers in the restitution amount. Petitioner argues that but for his counsel’s failure to make these objections, he would not have been convicted of violating the CAN-SPAM Act and his sentence and restitution would have been “much lower.” Id.

#### A. Failure to Object at Trial to Jury Instruction Defining “Commercial E-mail” as used in the CAN-SPAM Act

Petitioner asserts that his trial counsel rendered ineffective assistance by failing to object at trial to a jury instruction that defined the term “commercial e-mail” as that term is used in the CAN-SPAM Act. Mot. at 5. Petitioner alleges that the jury instructions improperly expanded the scope of the act by allowing conviction if the e-mail was merely “related to” a product or service. Id. Petitioner notes that on appeal, the Ninth Circuit agreed that the instruction was improper, but did not grant relief because counsel stipulated to the instruction, failed to object on that basis, and did not argue that the e-mail was outside the scope of the statute. Id.

The government responds that while the Ninth Circuit agreed that the “related to” phrase of the jury instruction impermissibly expanded the scope of the statute, the court found that the evidence at trial “was sufficient for the jury to conclude that the e-mail was a ‘commercial electronic mail message’ as that term is [used in the CAN-SPAM Act].” Opp’n at 19 (quoting United States v. Goodin, No. 07-50276, 2008 U.S. App. LEXIS 27342, at \*3 (9th Cir. Dec. 17, 2008)). Thus, the government argues that the failure by defendant’s counsel to object did not fall below the standard of professional

1 conduct or prejudice the defendant. Id. at 20. Petitioner does not address these issues  
2 in his reply. See Reply.

3 The Court concludes that petitioner has failed to show that he suffered any  
4 prejudice. Specifically, petitioner has not shown that but for the inclusion of the  
5 “related to” phrase in the jury instructions, he would not have been convicted of  
6 violating the CAN-SPAM Act. Therefore, the Court concludes that petitioner’s  
7 attorney did not provide ineffective assistance of counsel that would give rise to habeas  
8 relief under § 2255 for failing to object to the jury instruction defining “commercial e-  
9 mail” as used in the CAN-SPAM Act.

10 **B. Failure to Object at Sentencing on Causation Grounds to the Inclusion**  
11 **of Earthlink’s Servers in the Loss Amount**

12 Petitioner asserts that his trial counsel rendered ineffective assistance during  
13 sentencing by failing to object to the loss calculation on the specific grounds of a lack  
14 of causal connection. Mot. at 5. Petitioner argues that the loss calculation for  
15 sentencing was based on submissions by Earthlink, which appeared “seriously flawed”  
16 to the Ninth Circuit due to a lack of a causal connection between the cost of the servers  
17 and petitioner’s conduct. Id. (quoting Goodin, No. 07-50276, 2008 U.S. App. LEXIS  
18 27342, at \*3). Petitioner notes that the court did not remedy the error because  
19 petitioner’s counsel failed to challenge the causation issue or “otherwise let the district  
20 court know there was a real dispute to resolve.” Mot. at 5 (quoting Goodin, No. 07-  
21 50276, 2008 U.S. App. LEXIS 27342, at \*3). Petitioner argues that had petitioner’s  
22 counsel properly objected, he would have received a much lower sentence. Mot. at 5.

23 The government disputes petitioner’s claims that his counsel failed to properly  
24 challenge the causation issue. Opp’n at 20-21. The government argues that petitioner’s  
25 counsel argued vigorously against the Earthlink loss calculation at sentencing. Id. It  
26 argues that petitioner’s counsel specifically challenged Earthlink’s reported loss on a  
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1 number of grounds.<sup>3</sup> Opp’n at 21. Finally, the government contends that petitioner’s  
2 counsel stressed that Earthlink’s presumed loss was unrelated to defendant’s criminal  
3 culpability and that this Court acknowledged that petitioner’s counsel’s arguments  
4 concerning the loss calculations were “significant.” Id.; Rep. Tr. at 136.

5 Furthermore, even if petitioner’s counsel’s performance was deficient, petitioner  
6 must still show resulting prejudice in order to state a claim for habeas relief under §  
7 2255. Strickland, 466 U.S. at 697. Petitioner asserts that but for his counsel’s deficient  
8 performance, he could have received a “much lower sentence.” Mot. at 5. The  
9 government, however, argues that petitioner already received a sentence well below the  
10 guideline range. Opp’n at 14, 23. Although petitioner’s guideline range was seventy to  
11 eighty-seven months, to be followed by a mandatory twenty-four month statutory term  
12 of imprisonment for the count of aggravated identity theft, the Court sentenced him to  
13 only forty-six months to be followed by the mandatory twenty-four month term of  
14 imprisonment, for a total of seventy months. Id.; Rep. Tr. at 141. The government  
15 argues that the record makes it clear that it was petitioner’s conduct towards the witness  
16 and failing to appear that made this Court believe a seventy month sentence was  
17 necessary. Opp’n at 23; Rep. Tr. at 141. Accordingly, the government argues that  
18 petitioner has failed to meet the Strickland requirement of demonstrating a reasonable  
19 probability that, but for his counsel’s error, the result of the proceeding would have  
20 been different. Id. Petitioner does not address these issues in his reply. See Reply.

21 The Court concludes that petitioner has failed to show that he suffered any  
22 prejudice sufficient for habeas relief under § 2255. Even if the Court accepts  
23 petitioner’s assertion that his counsel did not adequately challenge the causation issue  
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25 <sup>3</sup> The government contends that petitioner’s counsel attacked Earthlink’s calculations  
26 arguing: (1) that there was a lack of evidence with respect to the dates of the incurred costs;  
27 (2) that there was “no evidence” that Earthlink incurred additional personnel expenses in  
28 responding to petitioner’s phishing scheme; and (3) that the loss figures were connected  
to phishing schemes other than petitioner’s. Opp’n at 21; Rep. Tr. at 133-36.



1 regarding the loss calculation, petitioner has failed to demonstrate a reasonable  
2 probability that the result would have been any different. Petitioner received a sentence  
3 well below the guideline range, and petitioner's speculation that he might have received  
4 an even lower sentence is insufficient to meet his burden.

5 **C. Failure to Object at Sentencing on Causation Grounds to the Inclusion**  
6 **of Earthlink's Servers in the Restitution Amount**

7 Petitioner asserts that his trial counsel rendered ineffective assistance during  
8 sentencing by failing to object to the restitution calculation on the specific grounds of a  
9 lack of causal connection. Mot. at 5. Based on the same allegedly flawed submission  
10 of Earthlink's purported losses discussed above, petitioner alleges that his restitutionary  
11 obligation would have been lower had his counsel properly objected to that amount. *Id.*  
12 The government disputes petitioner's challenge to the restitution amount. It argues that  
13 petitioner's claim is not cognizable in a 28 U.S.C. § 2255 motion. The Ninth Circuit  
14 has held that challenges to restitution may not be collaterally attacked under § 2255  
15 because they do not result in a defendant's "release." See United States v. Thiele, 314  
16 F.3d 399, 401-02 (9th Cir. 2002) (holding that a restitution order may not be attacked in  
17 a § 2255 motion, even when brought as an ineffective assistance of counsel claim and  
18 coupled with other cognizable claims). Accordingly, the Court concludes that petitioner  
19 does not have a cognizable claim for relief under § 2255 in his challenge of the  
20 restitution amount.<sup>4</sup>

21 **IV. CONCLUSION**

22 In accordance with the foregoing, petitioner's motion for relief pursuant to  
23 28 U.S.C. § 2255 is DENIED.


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25 <sup>4</sup> Petitioner brought his restitutionary challenge as a habeas petition pursuant to §  
26 2255, instead of pursuant to 28 U.S.C. § 2241. Even if petitioner had styled his petition  
27 pursuant to § 2241, his claim would not be cognizable because he challenges the validity  
28 of his sentence and not the manner, location, or conditions of his sentence's execution. See  
28 U.S.C. §§ 2241, 2255.



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2 IT IS SO ORDERED.

3 Dated: July 19, 2010

  
4 CHRISTINA A. SNYDER  
5 UNITED STATES DISTRICT JUDGE  
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